

**UNPUBLISHED**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
ABINGDON DIVISION**

**UNITED STATES OF AMERICA**

v.

**WALTER LEFIGHT CHURCH,**

Defendant.

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)

) Case No. 1:00CR00104

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) **OPINION AND ORDER**

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) By: James P. Jones

) United States District Judge

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*Thomas J. Bondurant, Jr., and Anthony P. Giorno, Office of the United States Attorney, Roanoke, Virginia, for United States of America; James C. Turk, Jr., Stone, Harrison, & Turk, Radford, Virginia, and Beverly M. Davis, Davis, Davis, & Davis, Radford, Virginia, for Defendant Walter Lefight Church.*

The government has filed a motion in limine seeking to exclude tape recordings made by the defendant, Walter Lefight “Pete” Church, of conversations between the defendant and his co-defendant, Samuel Stephen Ealy, as inadmissible hearsay. Defendant Church argues that the tapes are admissible under Federal Rule of Evidence 804(b)(3), relating to statements against interest. I find that they do not meet the requirements of the rule, and therefore grant the government’s motion.

# I

The defendants Church and Ealy have been charged with various federal crimes arising out of the murders of Robert Davis, his wife Una Davis, and her fourteen-year-old son, Robert Hopewell, on April 16, 1989. Ealy was tried in state court for the murders in 1991 and acquitted. The defendants' trials in this court were severed and Ealy was tried and convicted in June of 2002. Church is now being tried.

For a period of time, Church and Ealy were confined together in jail while awaiting trial. On September 28 and October 1, 2001, Church captured conversations between himself and Ealy on a tape recorder, allegedly seeking to elicit exculpatory statements from Ealy to aid Church in his defense.<sup>1</sup> Church argues that several statements made by Ealy on these tapes indicate Ealy's involvement in the murders and are thus admissible under Federal Rule of Evidence 804(b)(3) as statements against interest. The government moved to preclude introduction of these audio tapes into evidence on the ground that they are inadmissible under the rule. The defendant has filed a designation of the portions of the tapes that he wishes to play for the jury and the government's motion is ripe for decision.<sup>2</sup>

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<sup>1</sup> The tape recorder was supplied to Church in jail by his attorneys. It is alleged that Ealy was unaware that he was being recorded, although the government expresses skepticism in that regard.

<sup>2</sup> The defendant has proffered audio tapes and transcripts of the conversations. The transcript of the September 28, 2001, conversation will be hereafter referred to as "Sept. Tr." and

## II

There are three requirements for admissibility of hearsay under Rule 804(b)(3). *See United States v. Bumpass*, 60 F.3d 1099, 1102 (4th Cir. 1995). First, the declarant must be unavailable to testify at trial. The parties have stipulated that Ealy intends to exercise his right against self incrimination under the Fifth Amendment to the Constitution and will refuse to testify. Federal Rule of Evidence 804(a)(1) expressly provides that a witness invoking the Fifth Amendment is “unavailable.” *See also United States v. Brainard*, 690 F.2d 1117, 1123-24 (4th Cir. 1982). Thus, the first requirement under Rule 804(b)(3) is met.

The second requirement under 804(b)(3) is that the statement was against the penal interest of the declarant at the time it was made. *See Fed. R. Evid. 804(b)(3)* (providing that the statement must be “so far contrary to the declarant’s pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability . . . that a reasonable person in the declarant’s position would not have made the statement unless believing it to be true”). Church contends that there are several statements made by Ealy throughout the tapes which inculcate Ealy in the murders and are thus admissible under Rule 804(b)(3). However, I find that the statements

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that of the October 1, 2001, conversation as “Oct. Tr.”

made by Ealy and offered by Church do not sufficiently inculcate Ealy to meet this requirement under the Rule.

Several of the offered statements to not inculcate Ealy at all. Any reference to the lack of a relationship between Church and Ealy (Sept. Tr. at 2-3, 34-37) does not involve Ealy in the murders. The fact that Church did not know Ealy well enough to sell him drugs may exculpate Church, but it does not incriminate Ealy.

Likewise, Ealy's reference to Rick Purdue (Sept. Tr. at 38, 40) does not inculcate Ealy in the murders. Ealy merely admits that Purdue was not with him at any time on the weekend of the murders. Ealy does not, as Church contends, tell Church that Purdue "was not involved with the murders." (Def.'s Am. Designation, Ex. A at 2.) This removes any inference that Ealy was at the murder scene.

Church also offers into evidence two conversations referencing FBI agent Burke. In the first conversation, Ealy discusses a theory of the murders that he thinks agent Burke believes. Ealy states that "[h]e is thinking that John Mark and me planned -- I tried to get him to help me do that shit." (Sept. Tr. at 5-6.) Church contends that the pronoun "me" implicates Ealy. (Def.'s Am. Designation, Ex. A at 1.) However, in context, Ealy is merely discussing what agent Burke *thinks* happened. Given this context, the statement is too ambiguous to be classified as an admission by Ealy.

Church also cites to a portion of the conversation where Ealy states that agent Burke is incompetent for believing that Church was involved. (Sept. Tr. at 65-66.) While this statement may exculpate Church, it does not inculcate Ealy. In fact, Ealy asserts in that same statement: “I know I’m right. I know I didn’t do it, and I know we weren’t together.” (*Id.*) This statement thus cannot come in as a statement against Ealy’s interest.

Church also contends that the following inculcates Ealy:

Ealy: Yeah, Charlie said, hell -- he said, I never even knew Pete Church. He said, I knew -- I seen him one time. I said, what did you-all (inaudible) Gilmore (inaudible) Sam Ealy’s car. Did you-all ask him about that? They said, oh, we asked him about that. I said, why not? And you know about the gun deal, the gun that Robert was supposed to had on him?

Church: Yeah.

Ealy: (Inaudible) wants to know that gun was taken out the store. That was the store gun. (Inaudible).

Church: So evidently he didn't have no gun, did he?

Ealy: No, he never had no fucking gun.

(Sept. Tr. at 18-19.) Church contends that Ealy speaks here of things “only a killer would know.” (Def.’s Am. Designation, Ex. A at 2.) Again, I find that this statement is too ambiguous to meet the second requirement of Rule 804(b)(3). Following this

quoted passage, Ealy goes on to explain that Gilmore had told him that Davis relied on others to protect him. (Sept. Tr. at 19.) This serves as a possible explanation for why Ealy believed Davis did not have a gun at the time of the murders. Given the context of the statement, it does not necessarily inculcate Ealy.

The remaining statements offered by Church (Sept. Tr. at 70, 74) are likewise too ambiguous to qualify under the rule. However, even assuming that any or all of the statements offered by Church are inculpatory, they are nevertheless inadmissible because the third requirement of 804(b)(3) is not satisfied. Rule 804(b)(3) further provides that when an inculpatory statement is offered to exculpate the accused, it “is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.” Fed. R. Evid. 804(b)(3); *see also Bumpass*, 60 F.3d at 1102. Church argues that the fact that Ealy made these “admissions” to Church raises an inference that Church is innocent since if Church was involved in the crimes, Ealy would have no reason to confess to him. However, Church has failed to meet his burden by establishing that the statements are exculpatory and that they are trustworthy.

First, I cannot accept Church’s argument that statements made by Ealy on the tape clearly exculpate Church in the murders. The government suggests that the entire conversation was staged. Whether or not this is the case, I cannot find that any

of Ealy's statements clearly indicate Church's lack of involvement in the murders. The only clearly exculpatory statements come from the maker of the tapes, Church himself.

Second, the corroborating circumstances do not indicate the trustworthiness of the statements. The purpose of this requirement is not to determine that the declarant is trustworthy, but that the statement itself is trustworthy. *Bumpass*, 60 F.3d at 1102. The circumstances must "clearly indicate that the statement was not fabricated." *Id.* The party seeking to introduce the statement carries the burden of clearly establishing by corroborating circumstances that the statement is trustworthy. *See id.*

In *United States v. Lowe*, 65 F.3d 1137, 1144 (4th Cir. 1995), the Fourth Circuit set forth six factors to consider in determining the presence of corroborating circumstances:

(1) whether the declarant had at the time of making the statement pled guilty or was still exposed to prosecution for making the statement, (2) the declarant's motive in making the statement and whether there was a reason for the declarant to lie, (3) whether the declarant repeated the statement and did so consistently, (4) the party or parties to whom the statement was made, (5) the relationship of the declarant with the accused, and (6) the nature and strength of independent evidence relevant to the conduct in question.

*Id.* at 1146 (quoting *Bumpass*, 60 F.3d at 1102). After applying these factors to the Church/Ealy tape recordings, I find that they should not be admitted because the

corroborating circumstances do not clearly indicate the trustworthiness of the statements.

The factor that weighs most heavily in favor of excluding the evidence is whether Ealy repeated the statements and did so consistently. Minor contradictions in the story and failure to repeat the same set of facts undermine the declarant's credibility. *See, e.g., United States v. Noel*, 938 F.2d 685, 688 (6th Cir. 1991); *United States v. Bagley*, 537 F.2d 162, 168 (5th Cir. 1976). The government correctly points out that the "statements attributed to Ealy which purport to exculpate Church are directly contrary to statements made by Ealy to others which expressly inculcate Church in the Davis murders." (Gov't's Mot. Limine at 4.) At Ealy's trials, both in state court and in this court, he denied any involvement in the murders. Indeed, Ealy argued that others, including Church, committed the crimes.

Moreover, at several points in the taped conversations, Ealy expressly proclaims his innocence:

Ealy: Tim Burke is wrong, I know he is. I know him. I know I'm right. I know I'm right. I know I didn't do it, and I know we weren't together.

(Sept. Tr. at 65-66.)

Church: You killed the people and –

Ealy: If I would--I didn't do it. If I would have, it's over with.



(Oct. Tr. at 8.)

Church: They got you mad, don't they?

Ealy: I didn't do it. I didn't do it. But I swear to God, I will say that, just to piss 'em off. And (inaudible) what are they going to do about it?

(Oct. Tr. at 16.)

If, as Church contends, the court is to infer from Ealy's inculpatory statements Church's innocence, the fact that Ealy denies several times any involvement in the murders inhibits any such inference.<sup>3</sup>

Church has the burden of proving that the statements made by Ealy in these tape recordings are trustworthy. However, given the fact that Ealy has previously pointed his finger at Church as a perpetrator of these murders, and given the fact that Ealy's statements on the tapes concerning his involvement are at the least inconsistent, I cannot find that we should trust Ealy's statements. Thus, the requirement of corroborating evidence under Rule 804(b)(3) has clearly not been met. The statements are not reliable and therefore should not be admitted under this

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<sup>3</sup> The tape also indicates that Ealy says at one point: "I'm here to tell you this - I'm innocent." The defendant's version of the transcript leaves out the "I'm innocent" portion (Sept. Tr. at 26), but the tape is relatively clear on this point.

exception to the hearsay rule. The government's motion in limine to exclude the statements will therefore be granted.

### III

For the reasons stated above, it is **ORDERED** that the Government's Motion in Limine (Doc. No. 589) is granted and the defendant is precluded from offering the evidence in question.

ENTER: September 24, 2002

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United States District Judge